

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE:)	
MEDTRONIC, INC.,)	Multidistrict
SPRINT FIDELIS LEADS)	Litigation
PRODUCTS LIABILITY LITIGATION)	File No. 08-1905
)	(RHK/JSM)
THIS DOCUMENT RELATES)	
TO ALL CASES)	Saint Paul, Minnesota
)	September 24, 2008
)	10:10 a.m.
)	

BEFORE THE HONORABLE JANIE S. MAYERON
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
(STATUS CONFERENCE)

APPEARANCES

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P R O C E E D I N G S

I N O P E N C O U R T

THE COURT: Good morning, everyone. You're very far away at this time compared to the way it was.

Well, we're here this morning in connection with the matter of In Re Medtronic, Inc., Sprint Fidelis Leads Products Liability Litigation, court file 08-1905. If counsel would identify themselves for the record, starting first with counsel for Plaintiff.

MR. GUSTAFSON: Good morning, your Honor. Dan Gustafson on behalf of the Plaintiffs.

THE COURT: All right.

MR. SHELQUIST: Good morning, your Honor. Rob Shelquist on behalf of the Plaintiffs.

MR. RING: Good morning, your Honor. Dan Ring on behalf of Medtronic Defendants.

MS. HUELSKOETTER: Good morning, your Honor. Jennifer Huelskoetter on behalf of the Medtronic Defendants.

THE COURT: All right. Just so you all know, because I'm sure this is probably your first appearance here in this courtroom, on the table there you can see the microphones. In order to make sure that you are being recorded, I can certainly hear you, there's a button there that you would press and the green light needs to be on. If

1 the green light is off, which, for example, if you wanted to
2 confer among each other, the good news is we can't hear you;
3 but the bad news is we can't hear you. So if you're
4 speaking from counsel table you need to make sure that those
5 microphones are on. The ones at the podium are already on.

6 All right. We're here today to have our monthly
7 status conference and it looks like there is no one here, if
8 I'm correct, other than inside counsel for Medtronic. We
9 did have a conference here in chambers for the last half
10 hour where we addressed a variety of issues. And what I'd
11 like to do is at least walk through them so to the extent
12 that other counsel or parties wish to review this transcript
13 they will know what occurred.

14 The first item that we talked about was the issue
15 with respect to the tolling order and multiple parties or
16 consolidation order. At the last status conference those
17 two issues were teed up for the Court. We asked that the
18 attorneys present to us proposed orders on these issues,
19 which they did do as part of their joint report for this
20 status conference. And the attorneys did indicate they
21 wanted to make some brief comments with respect to each of
22 their proposed orders.

23 Mr. Gustafson.

24 MR. GUSTAFSON: Thank you, your Honor. Again,
25 with respect to the tolling agreement, Plaintiffs' view is

1 that this is a matter that is within the Court's discretion.
2 We have set out our position in the papers and we just think
3 that it's, as the 10th Circuit observed in the case we
4 submitted recently, you know, this is a question of
5 efficiencies. If we don't have a tolling order in place
6 here, we're going to have people be compelled to file their
7 case either in this court or in an appropriate state court
8 to guard against the one-year statute of limitations which
9 is coming up on the one-year anniversary of the recall.

10 We don't see any prejudice to Medtronic on this
11 issue. All of the issues about whether the statute has been
12 tolled, whether the statute had already run, are preserved
13 by the order that we submitted. And we think that in the
14 interests of the efficient administration of justice, the
15 Court ought to enter that tolling order.

16 With respect to the multiple parties or joinder
17 issue, we have both submitted orders. The only significant
18 difference in those orders is the question of whether you
19 have a same state law apply or whether you have to also have
20 at the same hospital, clinic, physician. We think that the
21 fact differences that arise from being at a different
22 physician or a different clinic are not of the kind that
23 Rule 20 contemplates having separate complaints for,
24 regardless of whether you went to the same doctor or not.
25 If Nebraska law or Minnesota law is going to apply, the

1 factual differences presented by which hospital, which
2 clinic you went to are not the kind of factual differences
3 that prevent joinder under Rule 20.

4 Again, this is a situation where we don't see any
5 prejudice to Medtronic if the Court enters this order. Both
6 our order and the order that Medtronic submitted preserve
7 the right to move to have these cases severed for trial.
8 And to the extent that there are differences that the Court
9 ultimately concludes, whether it's this Court or a Court
10 that is remanded -- transferred to under the MDL process,
11 whatever issues that arise for trial would be handled then
12 in any event.

13 Even if joinder were unquestionably proper under
14 Rule 20, there might be circumstances in which the cases
15 would be severed for trial.

16 On the other hand, Plaintiffs, if they can't join
17 these claims together under a consolidated complaint or a
18 multi-party complaint, they will have to incur significant
19 additional expenses in the filing fees, and the Court here
20 has to administer significant additional files. That there
21 are potentially hundreds of filings that will be saved by
22 entry of this order. So we think it make sense, again, for
23 efficiency purposes and doesn't do any prejudice to
24 Medtronic. Thank you.

25 THE COURT: All right.

1 Mr. Ring.

2 MR. RING: With respect to tolling, your Honor, we
3 do believe there is prejudice in entering a tolling order
4 without the benefit of the kind of analysis of an
5 individual's claim that happens in the cases cited by both
6 sides.

7 As to the efficiencies that American Pipe was
8 destined to protect, those efficiencies in this setting are
9 handled by the MDL proceeding itself. There's no need for
10 or concern for protective filings for people trying to
11 intervene in a class action to make their voices heard. The
12 MDL process itself protects that and already structures that
13 so that it is sufficient and that there's no need for this
14 kind of tolling order.

15 Bottom line, we don't think that it is appropriate
16 to enter an order without the benefit of that case-by-case
17 determination if and when American Pipe is appropriate, and
18 we do not agree that it is appropriate in every instance.
19 And we believe you need to balance the federal and the state
20 interests in order to make that decision and that's not what
21 the Plaintiffs' proposed order does.

22 With respect to joinder, I think the real dispute
23 here is the starting point. The question is whether we
24 start from a point that's appropriate under Rule 20 or, as
25 the Plaintiffs would have it, we fix it later.

1 In our view it's not appropriate under Rule 20 to
2 simply join on a statewide basis all Plaintiffs. I don't
3 think there's really any dispute that there would be
4 significant factual differences between those cases which
5 makes joinder inappropriate.

6 As to the efficiencies of joinder one way versus
7 another, we think with the adoption of the complaint by an
8 adoption form and Medtronic's agreement to accept service
9 directly on counsel, that that sufficiently ameliorates the
10 cost concern that Mr. Gustafson identified. And that that
11 should be enough to balance the Court's interests in
12 efficiency and economy.

13 And I would also say with respect to filing fees,
14 the Court set filing fees consistent with Rule 20 to
15 represent the cost the Court will incur to administer the
16 filing of the complaint. When you have a statewide joinder,
17 the Court is still going to have to enter and deal with
18 perhaps hundreds of issues with one filing fee. And I don't
19 think the Court's filing fees were set up to allow for
20 hundreds of Plaintiffs to join in one complaint. The burden
21 on the Court is real there, but it's only recovered one
22 filing fee for that instead of the many hundreds of filing
23 fees that it would recover to balance those administrative
24 burdens for individual complaints.

25 THE COURT: Let me just ask a question with

1 respect to Rule 20(a) which both sides have cited with
2 respect to their proposed order. It talks about the Court
3 has the discretion to join Plaintiffs if they assert any
4 right to relief jointly, severally, or in the alternative in
5 respect to arising out of the same transaction, occurrence,
6 or series of transactions or occurrences, and if there's any
7 common questions of law or fact.

8 I get where there's common questions of law or
9 fact. But even the concept of joining individuals who are
10 from the same state and saw or received treatment or care
11 from a common healthcare provider, clinic or physician isn't
12 traditionally what I think of as a -- as the same
13 transaction, occurrence, or series of transactions. Yet
14 Medtronic appears satisfied with that additional language
15 that would satisfy a Rule 20.

16 But it isn't what -- at least what I think of are
17 the traditional types of cases where it really is one
18 transaction or set of facts that all affected -- that
19 affected a number of Plaintiffs at the same time. For
20 example, an oil spill or something like that.

21 MR. RING: To that I would say, Judge, and I think
22 Mr. Gustafson made this point. Even in cases that might be
23 appropriately joined under Rule 20, may, as the facts
24 developed, be ones that would have to be severed in any
25 event. I think what we tried to do in proposing our order

1 is suggest some factors that introduce some commonality to
2 joinder that would balance commonality and efficiency in a
3 way that's closer to what would be appropriate under Rule
4 20.

5 There would obviously be circumstances where the
6 facts could be very different between same clinic, same
7 hospital, that may or may not be fully appropriate under
8 Rule 20 when you examine those facts.

9 But in order to establish some ground rules that
10 people can readily identify, we were comfortable that same
11 clinic, same hospital, or same doctor would introduce a
12 common factual basis sufficient for the Court to enter such
13 an order balancing the efficiencies within the discretion of
14 the Court to do that, balancing the concerns raised by the
15 Plaintiffs over multiplication of suits, and that it would
16 be appropriate.

17 Are there circumstances where those could be very,
18 very different? Yes. But in trying to enter an order that
19 sets some ground rules, that seemed to be a readily
20 identifiable set of facts that, one, would be easy for
21 Plaintiffs to identify, it would be easy for the Court to
22 monitor, it would be easy for us to monitor, because those
23 are identifiable objectives, at least at that level.

24 Within a particular case, if you were finding this
25 out on a motion-by-motion basis, there may be those settings

1 where it wouldn't be appropriate. But balancing all that we
2 thought this order would be appropriate.

3 THE COURT: All right. Anything further on the
4 tolling or consolidation issue on behalf of Plaintiffs?

5 MR. GUSTAFSON: Nothing further, your Honor.

6 THE COURT: All right. Why don't we then speak to
7 the issue of the stipulation to modify the observation
8 period and what the parties -- where the parties are with
9 the issue of destructive testing. If you want to just
10 summarize briefly.

11 MR. GUSTAFSON: Your Honor, we had submitted a
12 stipulation several weeks ago to provide for two additional
13 observation days. Those have now occurred. The parties are
14 meeting and conferring about an order which will replace, I
15 believe it's Court Order 6 right now, for the preservation
16 and testing of the devices at issue. We have not reached
17 agreement yet but we're getting close and we expect to
18 either reach agreement or crystalize the dispute so we can
19 submit it to the Court in the informal fashion which was
20 described earlier.

21 THE COURT: All right.
22 Anything further, Mr. Ring?

23 MR. RING: No.

24 THE COURT: All right. And I did indicate to the
25 attorneys in the informal conference, I will go ahead and

1 sign the order modifying currently Order 6 and provide the
2 two additional days that already in fact have occurred. But
3 just so that everybody knows that that was also with the
4 blessing of the Court. Plaintiffs will be providing to me a
5 draft order for me to sign.

6 With respect to the issue of the upcoming hearing,
7 we have scheduled for October 30 the hearing on the Motions
8 to Dismiss that have been filed by the Defendants. At the
9 informal conference we notified the attorneys that we will
10 be -- Judge Kyle's chambers will notify counsel as to how
11 much time they should assume he will allow for oral
12 argument.

13 Our understanding is that with respect to the
14 issue of the TPP motion, that will be argued separately,
15 although there certainly will be issues that are common to
16 the main motion on the master complaint. We will make sure
17 that there's adequate time to address those issues
18 separately.

19 The recommendation has been that other than lead
20 counsel arguing on these issues and the counsel who is
21 affected by that other complaint, the TPP matter, that oral
22 argument be confined to those who -- to lead counsel. And
23 that is the Court's intention to do that so that all
24 argument that is going to be presented will be presented
25 through lead counsel and counsel on behalf of the

1 third-party payor complaint.

2 Judge Kyle's chambers will also let you know
3 whether he wishes to have an executive summary from counsel
4 as well.

5 We will hold the status conference, the monthly
6 status conference, immediately after that hearing and so the
7 attorneys should be submitting the agenda to us in advance
8 of that hearing consistent with when you have been
9 submitting them to us. I can't recall under the current
10 order but I think it's a week to ten days before this status
11 conference.

12 We also indicated to counsel that we have moved
13 the next two status conferences, the November and December
14 status conferences, to November 19 at 10:00 a.m. and
15 December 17 at 10:00 a.m., with the informal conference with
16 the Court with lead counsel to take place at 9:30 a.m. on
17 both of those dates. And that's to accommodate the fact
18 that the normally scheduled status conference would be
19 falling on the eve of Thanksgiving and the eve of Christmas
20 and we are assuming that no one wished to travel here on
21 those dates.

22 And the only other issue that we addressed had to
23 do with ESI, with electronically stored information. And if
24 you want to report just briefly on that, Mr. Gustafson and
25 Mr. Ring.

1 MR. GUSTAFSON: Again, thank you, your Honor.

2 We have continued to meet with counsel for
3 Medtronic on the ESI issues. I think that, as Mr. Ring said
4 in chambers, we are all comfortable with the fact that the
5 things that are being done have been disclosed and everybody
6 is aware of it. We're working forward to try to get an
7 order in place when the time is appropriate, but we don't
8 think there's anything now that needs involvement of the
9 Court.

10 THE COURT: Mr. Ring?

11 MR. RING: That's a fair summary, your Honor.

12 THE COURT: All right. The last item had to do
13 with at the last status conference, actually prior to it,
14 Plaintiffs had submitted to this Court a memorandum with
15 respect to how time and expenses would be handled by all
16 Plaintiffs' counsel. At that time they -- we had indicated
17 we wanted an order so that -- a proposed order so we could
18 memorialize that.

19 Mr. Shelquist, you indicated you're still working
20 with various -- or Mr. Gustafson indicated you're still
21 working with Plaintiffs' counsel. That there's a committee
22 working on it. And I did indicate to the attorneys that I
23 did want to have a proposed order in place by the next
24 status conference so that that would come to us before the
25 October 30th status conference.

1 MR. SHELQUIST: Your understanding is correct,
2 your Honor, and we will submit that before the next status
3 conference.

4 THE COURT: All right. That's all I show on my
5 notes for today's status conference.

6 Mr. Gustafson or Mr. Shelquist, do you have
7 anything further?

8 MR. GUSTAFSON: The only other thing that we ought
9 to put on the record, your Honor, is that we have not --
10 nothing has changed with respect to the State Court
11 proceedings in Minnesota. We have not heard from Judge
12 Riley and there has been no status conference scheduled. So
13 there's no -- nothing required at this point with respect to
14 the State Court liaison. Other than that, Plaintiffs don't
15 have anything else, your Honor.

16 THE COURT: All right.

17 Mr. Ring?

18 MR. RING: Nothing further from the defense, your
19 Honor.

20 THE COURT: All right. And it appears again no
21 one else appeared here so that will conclude this morning's
22 proceeding. Thank you very much.

23 MR. GUSTAFSON: Thank you, your Honor.

24 MR. RING: Thank you, your Honor.

25 (Court adjourned at 10:25 a.m.)

* * *

I, Carla R. Bebault, certify that the foregoing is
a correct transcript from the record of proceedings in the
above-entitled matter.

Certified by: s/Carla R. Bebault
Carla R. Bebault, RPR, CSR